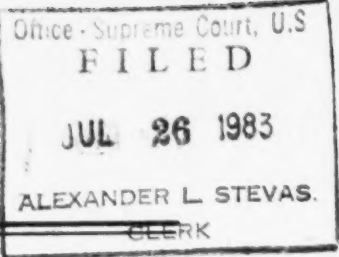


No. 82-1914



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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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EVELYN FALKOWSKI, PETITIONER

v.

BERTRAM PERRY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the court of appeals erred in affirming a district court order granting petitioner attorney's fees for the period between the filing of her complaint and the date her claim was rendered moot, and denying fees for all subsequent proceedings.

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## **OPINIONS BELOW**

The opinion of the court of appeals issued on October 25, 1982 (Pet. App. 137a) is unpublished. The opinion of the district court issued on February 13, 1981 (Pet. App. 82a) is unpublished.

## **JURISDICTION**

The judgment of the court of appeals was entered on October 25, 1982. A petition for rehearing was denied on January 26, 1983 (Pet. App. 135a-136a). On March 21, 1983, Justice Powell extended the time within which to petition for certiorari to May 26, 1983. The petition was filed on May 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case is one of several growing out of a personnel dispute between petitioner and her former subordinate, Bertram Perry, in the Equal Employment Opportunity Commission ("EEOC") district office in Birmingham, Alabama. Because of recurring intraoffice disputes, the EEOC in August 1975 proposed to detail Bertram Perry, deputy district director, to Washington, D.C. Perry sued to enjoin his removal and on September 11, 1975, the district court entered a preliminary injunction to that effect (Pet. App. 3a). *Perry v. Golub*, 400 F.Supp. 409 (N.D. Ala. 1975).<sup>1</sup> Efforts to detail Perry to Washington were thereafter abandoned (*id.* at 4a).

On April 19, 1976, petitioner (then the district director of the Birmingham office) sued the chairman and other officers of the EEOC under Title VII of the Civil Rights Act of 1964 (42 U.S.C. (& Supp. V) 2000e-16), Exec. Order No. 11,478, 3 C.F.R. 133 (1969 comp.), and 42 U.S.C. (& Supp. V) 1981, 1983, and 1985. She alleged that the Commission had impermissibly withheld from her the authority usually accorded district directors (Pet. App. 86a-87a). Two weeks later, on May 3, 1976, the Commission restored petitioner's full authority as district director (Pet. App. 87a).

On November 30, 1976, the district court held that petitioner's and Perry's actions were moot (Pet. App. 4a, 87a). *Perry v. Golub*, 74 F.R.D. 360 (N.D. Ala. 1976). The court found that petitioner had been exercising the full authority of a district director since May 3, 1976, and that resumption of the conduct alleged in her complaint was unlikely (Pet. App. 87a). Similarly, the court held that no live controversy remained in Perry's case because there was no longer an effort to remove him. It therefore dissolved the preliminary

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<sup>1</sup>Petitioner was named as a defendant in that action, but the complaint was dismissed as to her on November 23, 1976 (Pet. App. 4a).

injunction entered in his favor in September 1975 (Pet. App. 4a). The district court nevertheless "retained jurisdiction" of both actions, and enjoined the EEOC from removing either petitioner or Perry without prior court approval (Pet. App. 5a, 87a-88a). Petitioner appealed and the EEOC cross-appealed.

2. While these appeals were pending, problems in the Birmingham office continued. In November 1977, the EEOC petitioned the district court for leave to fire petitioner and Perry. These petitions were later amended to seek permission to transfer petitioner and Perry to different jobs in Washington. On November 21, 1978, the district court ruled on these petitions (Pet. App. 7a, 88a). *Falkowski v. Perry*, 464 F.Supp. 1016 (N.D. Ala. 1978). It dissolved the injunction against petitioner's removal, finding that the Commission's proposal was neither discriminatory nor retaliatory (Pet. App. 89a). The court refused, however, to dissolve the injunction as to Perry, finding that a retaliatory motive existed for his attempted transfer (Pet. App. 7a). Petitioner and the EEOC again appealed.

3. On April 25, 1979, the court of appeals ruled on the appeals taken from the district court's November 30, 1976 decision (Pet. App. 133a). It held that "[t]he district court correctly dismissed these actions without prejudice on account of mootness" (*id.* at 134a). The court also held that since the actions were moot, the district court had improperly retained jurisdiction; it thus vacated the outstanding injunctions against removal of Perry and petitioner. The court stated (*ibid.*):

The effect of such dismissals was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudication of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties \* \* \*.

4. On July 25, 1979, the court of appeals ruled on the appeals from the district court's November 21, 1978 decision (App., *infra*, 1a). The court noted that the appeals were taken from orders based on injunctions which it had already vacated. Consequently, the court also vacated the November 1978 orders. Petitioner sought review in this Court. Certiorari was denied on May 12, 1980. *Falkowski v. Perry*, 446 U.S. 936 (1980).

5. On February 17, 1981, in response to Falkowski's petition for attorney's fees and costs, the district court granted her \$934.96 as a prevailing party under Section 706(k) of Title VII, 42 U.S.C. 2000e-5(k). (Pet. App. 82a.) The court determined that "the filing of the plaintiff's lawsuit on April 19, 1976 acted as a causal impetus to the restoration of her authority on May 3, 1976 and that she was to this extent the prevailing party" (Pet. App. 94a). The court denied fees for all proceedings after May 3, 1976, when the case became moot, on the ground that petitioner was not thereafter a prevailing party (*id.* at 94a-103a). The district court also rejected petitioner's claim for fees from the EEOC in connection with *Perry v. Golub*, since she and the Commission were not adversaries in that action (Pet. App. 105a). Petitioner appealed.<sup>2</sup>

6. On October 25, 1982, the court of appeals affirmed (Pet. App. 137a). It is of this decision that petitioner now seeks review.<sup>3</sup>

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<sup>2</sup>The EEOC appealed from the district court's attorney fee award of \$99,331.90 to Bertram Perry (Pet. App. 1a, 73a). *Perry v. Golub*, 25 Empl. Prac. Dec. (CCH) para. 31,488 (N.D. Ala. 1981). This appeal and petitioner's were consolidated. The court of appeals limited Perry's award to services rendered before the case became moot (Pet. App. 139a).

<sup>3</sup>The EEOC is not a party to *Falkowski v. Bertram N. Perry*, No. 81-7643 (11th Cir. Oct. 25, 1982), decided together with *Falkowski v. Lowell Perry*, No. 81-7278 (11th Cir. Oct. 25, 1982). See Pet. App. 137a. In the former action the court of appeals affirmed the district



## ARGUMENT

1. Petitioner appears to contend that the court of appeals erred in affirming the district court's order limiting her attorney's fees to the period between the filing of the suit and its dismissal as moot (Pet. 49-50). She asks that this Court "remand for fee Opinions by an impartial tribunal" (*id.* at 51). Because the district court correctly limited the fee award, and because its decision was correctly affirmed by an "impartial tribunal," no further review is warranted.

Petitioner filed her complaint on April 19, 1976, alleging that the Commission had improperly limited her authority to manage the Birmingham EEOC office, in violation of Title VII. As petitioner concedes (Pet. 17-18), her full authority was restored on May 3, 1976. The case was subsequently dismissed as moot on November 30, 1976, and separate panels of the Fifth Circuit, on two different appeals, upheld the dismissal for mootness (Pet. App. 133a; App., *infra*, 1a). This Court denied review.

The court of appeals properly affirmed the district court's denial of attorney's fees to petitioner for all proceedings after the case became moot. Where a district court lacks subject matter jurisdiction—and the authority to issue orders—a party cannot "prevail" for purposes of attorney's fees on any matter pertaining to those orders. *Taylor v. Sterrett*, 640 F.2d 663, 670 (5th Cir. 1981); *Richardson v. Wiley*, 569 F.2d 140, 143 (D.C. Cir. 1977) ("We express no

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court's order denying petitioner attorney's fees as a prevailing defendant. This brief addresses only issues raised in the latter action.

Petitioner has filed another action against the EEOC and the Department of Justice, in which she alleges that she was improperly refused legal representation in connection with *Bertram Perry v. Falkowski*, No. CV78-PT-0935-S (N.D. Ala. Apr. 17, 1981). See Pet. App. 120a. In that action petitioner has appealed the district court's order granting summary judgment to the EEOC and the Department of Justice. *Falkowski v. EEOC*, No. 82-1446 (D.C. Cir., argued Dec. 13, 1982).

view of the scope of the term 'prevailing party' except to hold that it cannot include a plaintiff in a case in which the district court had no jurisdiction.").

The proceedings in the district court following the dismissal for mootness involved the injunction against petitioner's removal from her position in the Birmingham office. The injunction was later vacated by the Fifth Circuit as beyond the district court's jurisdiction. Petitioner cannot have prevailed by virtue of that injunction, which the court had no authority to enter.

Petitioner also seeks fees for both appeals to the Fifth Circuit. Petitioner first appealed the dismissal of her suit as moot, and her dismissal as a defendant in *Perry v. Golub*. See note 1, *supra*. The Fifth Circuit upheld both dismissals on April 25, 1979 (Pet. App. 133a). Petitioner later appealed the district court's November 21, 1978 order dissolving the injunction against her removal. On July 25, 1979, the Fifth Circuit reaffirmed its prior dismissal of the suit, thus leaving the Commission free to transfer her (App., *infra*). Since petitioner did not obtain the relief she sought on either appeal, she clearly was not the prevailing party.<sup>4</sup>

2. Petitioner also asserts that her reputation has been damaged by the district court's 1975 opinion in *Perry v. Golub*, 400 F.Supp. 409 (N.D. Ala.),<sup>5</sup> and asks this Court to "cause published clarification" to clear her name (Pet. 51). Petitioner made essentially the same argument before this

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<sup>4</sup>Similarly, the district court did not abuse its discretion in denying petitioner's request for attorney's fees from the EEOC for legal expenses incurred in challenging a 1975 temporary transfer in *Falkowski v. Powell*, No. CA-73-P-1009-S (N.D. Ala. Sept. 9, 1974) — a case which was before another judge—and in *Perry v. Golub*, where petitioner was dismissed as a co-defendant four years earlier, and was in any event not an adverse party to the Commission (Pet. App. 90a-91a, 103a-105a).

<sup>5</sup>See, e.g., Pet. 43, 46, 48.

Court in her 1979 petition, which was denied. Certiorari should be denied again for the same reasons.<sup>6</sup>

In the 1975 opinion in question, the district court's findings of fact were made only in the context of a decision whether to issue a preliminary injunction, not as conclusive findings on the merits. The court specifically noted that it was "not passing on the propriety or impropriety of the District Director's actions." 400 F.Supp. at 411 n.3. In the attorney's fee opinion in *Perry v. Golub*, the court referred to the 1975 opinion, and reiterated that it had made no finding of improper conduct on petitioner's part (Pet. App. 74a). Any allegation that she has been harmed in her attorney's fee litigation or elsewhere by statements made in the 1975 opinion is without merit. Indeed, the attorney's fee ruling in petitioner's case did not refer to *Perry v. Golub*, but focused instead on the allegations in petitioner's complaint, the date when she prevailed, and the effect of mootness on her status as a prevailing party.

Petitioner does not dispute that her cause of action has been moot since 1976. As we argued in response to petitioner's 1979 petition, when a legal controversy has ended, it is a waste of judicial resources to require an appellate court to review findings of a district court simply because one party is unhappy with those findings. 79-1244 Br. in Opp. 8.<sup>7</sup> Such a result would be at odds with the principles underlying the mootness doctrine.

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<sup>6</sup> *Perry v. Golub* is in any event not before the Court. The action was held moot in 1976. *Perry v. Golub*, 74 F.R.D. 360, 369 (N.D. Ala.). The dismissal was affirmed in 1979 (Pet. App. 133a). No party has petitioned for certiorari from the Eleventh Circuit's 1982 decision affirming in part and reversing in part an award of attorney's fees to Perry (Pet. App. 138a-139a).

<sup>7</sup> We have served petitioner with a copy of our 1979 Brief in Opposition.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

**REX E. LEE**  
*Solicitor General*

**DAVID L. SLATE**  
*General Counsel*  
*Equal Employment Opportunity Commission*

**JULY 1983**

**APPENDIX**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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No. 78-3726  
Summary Calender

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EVELYN FALKOWSKI,  
Plaintiff-Appellant,

v.

LOWELL PERRY, ETC., ET AL.,  
Defendants-Appellees,

\* \* \*

BETRAM PERRY,  
Plaintiff-Appellee,

v.

ALVIN GOLUB, ET AL.,  
Defendants-Appellees-Appellants

and

EVELYN FALKOWSKI,  
Defendant-Appellant.

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Appeals from the United States District Court for the  
Northern District of Alabama

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(July 25, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

Brief recital of the underlying facts in these consolidated cases will facilitate an understanding of the disposition of the appeal before us.

Mrs. Falkowski was the District Director of the Jackson, Mississippi, District Office of the Equal Employment Opportunity Commission (EEOC) before November 4, 1974. Unable to secure a lateral transfer to the Birmingham, Alabama, District Office (BIDO), she filed suit against her employer, alleging discrimination. That case was amicably settled, the EEOC agreeing to give serious consideration to Mrs. Falkowski's application for transfer, and a consent decree consistent with the agreement was entered. As a result of that agreement and consent decree, Mrs. Falkowski was, on November 4, 1974, transferred to her present position as District Director of the BIDO.

On April 19, 1976, however, Mrs. Falkowski filed an action alleging that the defendants had failed to abide by the consent decree and were retaliating against her for bringing the prior action by refusing her the administrative support that was necessary for her to operate the BIDO effectively. On November 30, 1976, the district court dismissed the complaint without prejudice on account of mootness, but retained jurisdiction of the case so that any proposal to remove Mrs. Falkowski from her position required approval upon petition to the district court.

Mr. Perry has been with the BIDO since 1968 and has been Deputy Director of that office since 1972. On August 15, 1975, Mr. Perry received notice that he was being "detailed" to Washington, D.C., effective August 25, 1975. He brought an action on August 18, 1975, seeking to enjoin the detail. The district court issued a preliminary injunction prohibiting the defendants from removing Mr. Perry from his position, based upon an finding that the "detail" was

initiated largely as a result of the EEOC's attempts to suppress Mr. Perry's continual and outspoken protests of the BIDO's mismanagement and that the proposed "detail" was, in reality, a transfer from the BIDO. *Perry v. Golub*, 400 F. Supp. 409 (N.D. Ala. 1975). The preliminary injunction was dissolved on November 30, 1978, before the case was tried, on account of mootness, there then being no attempt to transfer Mr. Perry. The district court retained jurisdiction of the case to protect Mr. Perry from retaliation so that any attempt to remove Mr. Perry from his position required approval upon petition to the district court. *Perry v. Golub*, 74 F.R.D. 360 (N.D. Ala. 1976).

The conflict in the BIDO between Mrs. Falkowski and Mr. Perry raged on, however, and on November 7, 1977, seeking to process adverse action against both Mrs. Falkowski and Mr. Perry, the EEOC filed petitions with the district court, requesting permission to process adverse action against the complainants or, in the alternative, dissolution of the injunction. The district court denied the application to sanction Mr. Perry and granted the petition to sanction Mrs. Falkowski, thus holding that adverse action against Mr. Perry without the district court's approval would violate the terms of the earlier order.

In the meantime, the EEOC had filed an appeal from the earlier order. On April 25, 1979, a panel for this Court decided that appeal. The decision affirmed the district court's initial dismissal of Mrs. Falkowski's and Mr. Perry's actions without prejudice on account of mootness and specifically held that the other orders, including the orders requiring the EEOC to seek the court's permission before altering the status of the complaining parties, were void for want of jurisdiction. The appeal before us now is from the



orders issued in response to petitions which were apparently required by void orders. To the extent that the district court's orders, the subjects of this appeal, may be construed as orders continuing the injunctive features of the void orders of November 30, 1976, those judgments are summarily vacated.

VACATED.